Harta Empat Sdn Bhd v Koperasi Rakyat Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL APPLICATION NO A-02-602-1995
NH CHAN, ABU MANSOR AND MOKHTAR SIDIN JJCA
24 JANUARY 1997

Land Law *— Charge — Validity of — Charge subject to prohibition imposed by written law — Charge executed to provide security for loan made to director of company contrary to provision of the Companies Act — Charge rendered unfit for registration — Whether charge was valid — National Land Code 1965 ss 241(3)(a) & 301(c)*

Companies and Corporations *— Directors — Loans to — Charge provided by company as security for loan — Prohibition in Companies Act against company providing security for loan made to director — Whether exception in s 133(1)(a) of the Companies Act 1965 applicable — Whether charge was valid — Companies Act 1965 s 133(1)(a)*

Companies and Corporations *— Charges — Securities for loan given to director of company — Prohibition in Companies Act against company providing security for loan made to director — Whether exception in s 133(1)(a) of the Companies Act 1965 applicable — Whether charge was valid — Companies Act 1965 s 133(1)(a)*

The appellant was a company registered under the Companies Act 1965 ('the Act') while the respondent was a co-operative society registered under the Co-operative Societies Act 1948. The appellant executed a charge over its land ('the charge') under the National Land Code 1965 ('the Code') to provide security for a loan made to a director of the appellant ('the director') which was to be used for the purposes of the appellant. The appellant applied to declare the charge as against the law, null and void being not in compliance with s 133 of the Act and for a consequential order to cancel the registration of the charge. Counsel for the appellant submitted that the prohibition imposed by s 133(1) of the Act on the provision of security by a company in connection with a loan made to its director had rendered the charge unfit for registration, and, therefore, the registered charge was void and should be cancelled. The trial judge found that although the charge was to provide security by the appellant in connection with a loan made to its director by the respondent, the director had borrowed the money, not for himself but, for the benefit of the appellant and held that the charge was enforceable and valid. The appellant appealed.

Held, allowing the appeal:

(1) The appellant was not absolved by s 133(1)(a) of the Act from the restriction against providing the security for the loan made to its director by the respondent merely because the loan was for the benefit of the appellant. In the present case, the funds were not meant to meet the disbursements of the director so that the prohibition against the appellant company providing the security would still be applicable (see p 387C–E, F).

(2) Under the Code, a charge is subject to 'any prohibition ... imposed by ... any ... written law for the time being in force' (s 241(3)(a)) and it takes effect upon registration (s 243). Registration of a charge is obtained by presenting it to the registrar (s 292(1)(c)) but only if the charge is fit for registration (s 301), and the charge is fit for registration if para (c) of s 301 is satisfied, that is to say, 'that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force' (s 301(c)). Therefore, the immovable property in the instant case could be charged but the charge was subject to any prohibition imposed by written law. Section 133(1) of the Act forbade the appellant company from providing the security for the loan made to its director by the respondent. The prohibition in s 133(1) had rendered the charge unfit for registration under s 301(c) of the Code. The charge was therefore invalid and should be cancelled (see pp 386C–D and 388G–H).

[Bahasa Malaysia summary

Perayu adalah sebuah syarikat yang didaftarkan di bawah Akta Syarikat 1965 ('Akta tersebut') manakala penentang adalah suatu pertubuhan koperasi yang didaftarkan di bawah Akta Pertubuhan Koperasi 1948. Perayu melaksanakan gadaian ke atas tanah kepunyaannya ('gadaian tersebut') di bawah Kanun Tanah Negara 1965 ('Kanun tersebut') untuk menyediakan cagaran kepada pinjaman yang dibuat kepada pengarah perayu ('pengarah tersebut') yang akan digunakan untuk tujuan-tujuan perayu. Perayu membuat permohonan untuk deklarasi bahawa gadaian tersebut adalah batal dan tak sah di sisi undang-undang kerana tidak mematuhi s 133 Akta tersebut dan untuk perintah berbangkit untuk membatalkan pendaftaran gadaian tersebut. Peguam kepada perayu menghujahkan bahawa larangan yang dikenakan oleh s 133(1) Akta tersebut atas penyediaan cagaran oleh syarikat berkaitan dengan pinjaman yang dibuat kepada pengarahnya telah menyebabkan gadaian tersebut tidak layak untuk pendaftaran, dan, oleh itu, gadaian yang didaftarkan itu adalah tak sah dan patut dibatalkan. Hakim perbicaraan mendapati bahawa walaupun gadaian tersebut adalah untuk menyediakan cagaran oleh perayu berkaitan dengan pinjaman yang dibuat kepada pengarahnya oleh penentang, pengarah tersebut telah membuat pinjaman wang bukan untuk dirinya sendiri, tetapi untuk manfaat perayu dan memutuskan bahawa gadaian tersebut boleh dikuatkuasakan dan sah. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Perayu tidak dibebaskan oleh s 133(1)(a) Akta tersebut daripada larangan terhadap menyediakan cagaran untuk pinjaman yang dibuat kepada pengarahnya oleh penentang hanya kerana pinjaman tersebut adalah untuk manfaat perayu. Dalam kes ini, wang itu tidak dimaksudkan untuk membuat pembayaran

pengarah tersebut. Oleh itu, larangan terhadap syarikat perayu menyediakan cagaran masih terpakai (lihat ms 387C–E, F).

(2) Di bawah Kanun tersebut, gadaian adalah tertakluk kepada 'apa-apa larangan ... yang dikenakan oleh ... mana-mana ... undang-undang bertulis berkuatkuasa pada masa itu' (s 241(3)(a)) dan ia berkuatkuasa atas pendaftaran (s 243). Pendaftaran gadaian diperolehi dengan mengemukakannya kepada pendaftar (s 292(1)(c)) tetapi hanya sekiranya gadaian itu adalah layak untuk pendaftaran (s 301), dan gadaian itu adalah layak untuk pendaftaran jika perenggan (c) s 301 dipenuhi, iaitu, 'bahawa urusniaga yang dilaksanakan tidak bertentangan dengan apa-apa larangan ... yang dikenakan oleh ... mana-mana undang-undang bertulis berkuatkuasa pada masa itu' (s 301(c)). Oleh itu, harta tak alih dalam kes ini boleh digadaikan tetapi gadaian itu adalah tertakluk kepada apa-apa larangan yang dikenakan oleh undang-undang bertulis. Seksyen 133(1) Akta tersebut melarang syarikat perayu daripada menyediakan cagaran bagi pinjaman yang dibuat kepada pengarahnya oleh penentang. Larangan dalam s 133(1) telah menyebabkan gadaian tersebut tidak layak untuk pendaftaran di bawah s 301(c) Akta tersebut. Gadaian tersebut oleh itu adalah tak sah dan patut dibatalkan (lihat ms 386C–D dan 388G–H).]

Notes

For cases on validity of charges, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1562–1564.

For a case on loans to directors, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 97.

For cases on charges, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 33–52.

Cases referred to

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

Harta Empat Sdn Bhd v Koperasi Rakyat Bhd [1995] 3 AMR 42:2488 (refd)

Legislation referred to

Companies Act 1965 s 133(1)

Co-operative Societies Act 1948 ss 21(1), 30

National Land Code 1965 ss 241, 242, 243, 292, 301(c)

Appeal from: Originating Summons No 24–995–91 (High Court, Ipoh)

Hira Singh and *T Gunaseelan* (*Asbir Hira Singh & Co*) for the appellant.
CV Das and *John Mathew* (*TH Su & Co*) for the respondent.

Cur Adv Vult A

NH Chan JCA (delivering judgment of the court): The appellant company applied by originating summons to declare the charge over its land, and I quote:

> ... as against the law, null and void being not in compliance with s 133 of the Companies Act 1965 B

and for a consequential order to cancel the registration of the said charge.

The question whether s 133(1) of the Companies Act 1965 ('the Act') operates to invalidate a security provided by a company for a loan made to a director of the company by another person in contravention of C the subsection or whether it merely prohibits the giving of such security on pain of incurring criminal liability is no longer justiciable, at least in this country, since the decision of the Federal Court in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313.

Section 133(1) forbids, subject to exceptions, a company making a D loan to a director of the company. It also forbids the giving of a guarantee or the provision of security by the company in connection with another lender's loan to a director of the company.

The subsection by itself does not invalidate the forbidden transactions, so that the company may incur civil liability for entering into them; see E *Feyen*. However before the company can be made liable, the transaction itself must be a valid and enforceable one. In the instant case, we are concerned with a charge under the National Land Code 1965 ('the Code') so that the question that arises is whether the provisions of the Code operate to invalidate the charge.

F

Feyen did not refer to the provisions of the Code when it considered the question of the validity of the two charge transactions in the case, nor did it discuss them. Therefore, any opinion expressed by *Feyen* on the validity of a charge must necessarily be *obiter*. See, especially, this passage ([1995] 3 MLJ at 313 at p 330):

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> To summarize, *our conclusion is that accepting that the charge transaction did breach s 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to* the loan or *the charge transactions*, regard being had to the context and purpose of s 133(1), and especially the principle underlying s 133(5), as explained above, which regrettably the learned judge failed to take into account or to give proper weight to, with H the result that his judgment cannot stand. (Emphasis added.)

We shall now deal with the relevant provisions of the Code.

The National Land Code 1965

I

In Part 16 of the Code (which deals with charges), s 241 states:

> 241(1) Subject to sub-section (3) —
>
> (a) the whole, but not a part only, of any alienated land;

A (b) the whole, but not a part only, of any undivided share in alienated land; and

(c) any lease of alienated land,

may be charged under this Act with —

(aa) the repayment of any debt, or the payment of any sum other than a debt; or

B (bb) the payment of any annuity or other periodic sum.

(2) ...

(3) The said powers shall be exercisable in any particular case *subject to* —

C (a) *any prohibition* or limitation *imposed by* this Act or *any* other *written law for the time being in force*; ... . (Emphasis added.)

So that by s 241, immovable property may be charged under the Code, but this is subject to any prohibition imposed by written law against the charge (sub-s (3)(a)). Section 242 provides for the creation of such a charge. It

D states:

242(1) Every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A.

E And s 243 says that the charge takes effect upon registration by rendering the property charged liable as security. It states:

243 Every charge created under this Act shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions thereof, express or implied.

F Part 18 of the Code deals with the registration of dealings in land and s 292 deals specifically with the instruments which may be registered under this Part. The section states:

292(1) The following instruments may be registered under this Part, and may be presented to the Registrar for that purpose in accordance

G with the provisions of sub-section (2) —

(a) ...

(b) ...

(c) any charge, discharge or instrument of postponement under Part Sixteen; ... .

H And s 301(c), which is under this Part, states:

301 *An instrument shall be fit for registration* under this Part *if, but only if*, the following conditions are satisfied —

(a) ...

I (b) ...

(c) that *the dealing which it effects is not contrary to any prohibition* or limitation *imposed by this Act* or *any* other *written law for the time being in force*, or to any restriction in interest to which the land in question is for the time being subject; ... . (Emphasis added.)

This means that a charge is subject to 'any prohibition ... imposed by ... any ... written law for the time being in force' (s 241(3)(a)) and is effected by an instrument in Form 16A (s 242(1)) which will take effect upon registration (s 243) so as to render the immovable property charged liable as security for the payment of money (s 241(1)). A

The charge is registered by the presentation of the Form 16A instrument to the registrar (s 292(1)(c)) only if the charge instrument is fit for registration (s 301), which is to say, 'that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force' (s 301(c)). B

Put shortly, a charge is subject to 'any prohibition ... imposed by ... any ... written law for the time being in force' (s 241(3)(a)). The charge takes effect upon registration (s 243). Registration of the charge is obtained by presenting it to the registrar (s 292(1)(c)) but only if the charge is fit for registration (s 301), and the charge is fit for registration if para (c) of s 301 is satisfied, that is to say, 'that the dealing which it effects is not contrary to any prohibition ... imposed by ... any ... written law for the time being in force' (s 301(c)). C D

Mr Hira Singh for the appellant submits that there is a prohibition imposed by a written law currently in force, namely, s 133(1) of the Act against the dealing which is effected by the charge, thus rendering the charge unfit for registration. Therefore, the registered charge is void and should be cancelled. E

Section 133(1) of the Companies Act 1965

This section imposes a blanket prohibition on loans by a company (other than an exempt private company) to a director of the company, and on the giving of a guarantee or the provision of security by the company in connection with a loan made to its director by another person. F

In the instant case, although the charge was to provide security by the appellant company in connection with a loan made to its director by the respondent, the judge at first instance had found that the director had borrowed the money, not for himself but, for the benefit of the appellant company. This is what the judge said (*Harta Empat Sdn Bhd v Koperasi Rakyat Bhd* [1995] 3 AMR 42:2488 at p 2499): G

> ... upon perusal, and the interpretation of the documentary and affidavit evidence, I am convinced that, despite the fact that the said Lim Chin Hin was the borrower of the said sum, it was purely for the benefit of the plaintiff company. This is evidenced by the payment of the sum of RM1,994,900 to Public Finance Bhd to redeem the lands charged by the said company to the bank, for the purposes of development, and a further sum of RM2,062m was subsequently remitted to the then solicitors for the company on 19 September 1985. The court in arriving at a fair and just decision must look beyond the form adopted, and examine the reality. It is of paramount importance to determine the purpose of the parties concerned, in regard to the obtaining of the loan. H I

> ... It cannot be denied that upon perusal of the facts and documents, the plaintiffs assisted this Lim Chin Hin to apply for the loan from the defendant company. After the loan was obtained, the plaintiffs used the monies for their own benefit.

From the judge's finding, it is clear that the charge in the instant case was intended to provide the security in connection with a loan made to a director of the appellant company so as to enable the borrowed funds to be used for the purposes of the appellant.

We do not think that the situation in the instant case, as found by the judge, absolves the appellant company from the restriction against providing the security for the loan made to its director by the respondent. We do not think that the appellant can be absolved by s 133(1)(a) which reads:

> 133(1) *A company* (other than an exempt private company) *shall not* make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company, or enter into any guarantee or *provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply* —
>
> (a) subject to sub-s (2), *to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company* or for the purpose of enabling him properly to perform his duties as an officer of the company; .... (Emphasis added.)

This section had the desired effect of prohibiting the appellant company from providing the security for the loan made to its director by the respondent. However, the prohibition would not apply if it was 'done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company'. In the present case, the funds were not meant to meet the disbursements of the director so that the prohibition against the appellant company providing the security still applies.

If the appellant company wanted to borrow money, then there would not be any necessity for such a circuitous route to be taken to obtain a loan for itself. If it could offer good security, as is the case here, it would be no hardship for the appellant to borrow elsewhere. It could borrow directly from any bank or financial institution and charged its property as security for the loan. But this was not the situation in the instant case. The appellant company only wanted to borrow from the respondent, a co-operative society, and this roundabout path was chosen to circumvent the rigours of s 30 of the Co-operative Societies Act 1948.

Section 30 of the Co-operative Societies Act 1948

Section 30(1) of this Act provides:

> 30(1) *A registered society may make loans* —
>
> (a) *to its members*;
>
> (b) to its employees;

(c) to its subsidiaries; or

(d) to another registered society which has obtained the approval of the Registrar-General as prescribed by the rules. (Emphasis added.)

By this section, the respondent co-operative society could lend money to its members. Unfortunately for the appellant company, it could not qualify for membership of the society. This is what s 21(1) of the Co-operative Societies Act says:

21(1) In order to be qualified for membership of a registered society a person, other than a registered society shall —

(a) be a citizen;

(b) have attained the age of eighteen years; and

(c) have been born or be resident or be in ownership of land within the area of operations of the registered society.

So the device of using a director of the appellant company who is a qualified person for membership under s 21(1) was chosen and the director was to apply for membership of the society thus enabling him to apply for a loan from the society. As we have pointed out earlier in this judgment, this does not absolve the appellant company from the prohibition against providing the security for the loan made to its director by the respondent. The appellant company should not have used its own director to borrow from the co-operative society. It could very easily have got round the prohibition by asking any other person who is not a director of the appellant but who is a member of the respondent to borrow from the respondent with the appellant company providing the security. But, we suppose, the appellant could not trust anyone except one of its own directors.

Conclusion

The upshot is this. Under the Code, the immovable property in the instant case could be charged but the charge was subject to any prohibition imposed by written law. Section 133(1) of the Act forbade the appellant company from providing the security for the loan made to its director by the respondent. The prohibition in s 133(1) had rendered the charge unfit for registration under s 301(c) of the Code. The charge is therefore invalid.

The appeal is allowed. We grant a declaration to declare the charge invalid as well as an order for the cancellation of the charge.

The appellant shall have the costs here and in the court below.

Appeal allowed.

Reported by Loo Lai Mee